

File No. EB-06-SD-210
NAL/Acct. No. 200732940004
FRN: 0007290406

⁵ 47 C.F.R. § 11.35.

through August 2006, the KEVT did not receive or retransmit required monthly tests (“RMTs”) from the first and second local primary stations (“LP-1” and “LP-2”). The review also showed that since June of 2005, KEVT did not receive any RWTs from the LP-2. The EAS logs also indicated that KEVT had transmitted only three RWTs during the 15 week period from April 30 – August 12, 2006. No entries were made by the KEVT staff in the EAS log to identify the causes of these failures or what steps were taken to remedy them. On the date of inspection, the San Diego agent requested that the LP-1 and LP-2 both transmit RWTs. Neither RWT could be heard through the KEVT EAS equipment and there was no indication that the KEVT EAS equipment received either RWT. The KEVT EAS equipment did not produce any EAS printout to indicate the RWTs from the LP stations had been received. The chief engineer acknowledged to the San Diego agent that the KEVT EAS equipment may have been having technical problems.

3. On August 29, 2006, the San Diego agent spoke with the KEVT chief engineer and the chief engineer advised that One Mart would be replacing the KEVT EAS equipment. The KEVT chief engineer indicated that he was in the process of obtaining cost estimates from various EAS vendors.

4. On December 28, 2006, the Enforcement Bureau’s San Diego Office issued the *NAL* in the amount of \$8,000 to One Mart for violating Section 11.35 of the Rules. One Mart filed a response (“*Response*”) to the *NAL* on February 27, 2007, and supplemented that response on June 24, 2007. In its *Response*, One Mart did not dispute the EAS violations found by the San Diego agent. Instead One Mart asked for mitigation of the forfeiture amount based on the destruction of two of the four KEVT antenna structures in 2003 by high winds, and the station’s efforts to rebuild while operating under special temporary authority at reduced power, which greatly reduced its revenue. One Mart also asked that we take into consideration its good faith efforts to replace the EAS equipment, as well as its history of compliance with the Commission’s Rules. In the *Forfeiture Order*, the Region reviewed the three years of tax records supplied by One Mart, and reviewed One Mart’s reported gross revenues. The Region determined that data produced by One Mart did not support cancellation or reduction of the forfeiture, as the forfeiture amount does not exceed two percent of One Mart’s average gross revenues for the three years covered by the financial documents.⁶ The Region also declined to reduce the forfeiture amount based on good faith efforts by One Mart because although One Mart acknowledged that new EAS equipment was needed for KEVT, and that it had planned to obtain such equipment, it produced no evidence that it initiated the purchase of new EAS equipment or the repair of the old EAS equipment repairs prior to the August 17, 2006, inspection by the San Diego agent, who notified One Mart of the EAS equipment issues at KEVT.⁷ Finally, the Region found that One Mart did have a history of compliance with the Commission’s Rules, and reduced the forfeiture amount from \$8,000 to \$6,400.⁸

III. DISCUSSION

5. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.⁹ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.¹⁰ In its *Petition*, One Mart argues that the

⁶ *Forfeiture Order*, 22 FCC Rcd at 16681.

⁷ *Forfeiture Order*, 22 FCC Rcd at 16681.

⁸ *Forfeiture Order*, 22 FCC Rcd at 16681 – 16682.

⁹ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, 15 FCC Rcd 18257, (EB 2000), citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹⁰ *EZ Sacramento, Inc.*, 15 FCC Rcd at 18257.

Region failed to consider any mitigating factors whatsoever in the *Forfeiture Order* in its assessment of the forfeiture against One Mart

6. One Mart first argues that the Region erred by not taking a “hard look” at the “nature, extent and circumstances” of the violation. We disagree. The “hard look” doctrine that is proposed by One Mart is the standard the Commission is required to use when reviewing “meritorious applications for waiver . . . and [the Commission] must consider all relevant factors.”¹¹ While the “hard look” standard is not relevant to this inquiry, we find that the Region appropriately reviewed all the relevant factors when assessing the forfeiture to One Mart. The Commission has already determined that the “adjustment criteria listed in . . . the guidelines reflect the factors outlined in the statute.”¹² For forfeitures assessed under Section 503 of the Act, as this one is, the adjustment factors included by the Commission in its downward adjustment criteria, in Section 1.80, are: (1) minor violation; (2) good faith or voluntary disclosure; (3) history of compliance; and (4) inability to pay.¹³ We find that the Region properly considered the downward adjustment criteria and concluded that One Mart’s violation, which consisted of KEVT(AM) failure to ensure the operational readiness of its EAS equipment from November 2005 through August 2006, and its acknowledgment that it needed to purchase new EAS equipment, was not a minor violation. We also affirm the Region’s finding that One Mart was not entitled to a reduction based on good faith or voluntary disclosure to the Commission because One Mart produced no evidence that it initiated the purchase of new EAS equipment or the repair of the old EAS equipment repairs prior to the August 17, 2006, inspection by the San Diego agent, who notified One Mart of the EAS equipment issues at KEVT.¹⁴ We further affirm the Region’s determination that One Mart had a history of compliance with the Commission’s Rules, and its reduction of the forfeiture amount from \$8,000 to \$6,400.

7. One Mart also argues that the Region did not appropriately consider One Mart’s ability to pay the forfeiture, given the losses One Mart had accumulated over the years. One Mart asserts that the finding that the forfeiture does not exceed two percent of One Mart’s gross revenues misconstrues the Commission precedent, *PJB Communications of Virginia, Inc.*,¹⁵ arguing that the case does not stand for the proposition that the Commission has generally looked to gross revenues as a reasonable and appropriate yardstick. We disagree. In *PJB Communications*, the Commission stated that the use of “gross revenues in assisting it to determine the parties’ ability to pay is both reasonable and appropriate and, moreover, a very useful yardstick in helping to analyze a company’s financial condition for forfeiture purposes.”¹⁶ Additionally, the Commission found that, “[i]n general, a licensee’s gross revenues are the best indicator of its ability to pay a forfeiture, . . . but that in some cases, other financial indicators, such as net losses, may also be relevant. If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not by itself mean that it cannot afford to pay a forfeiture.”¹⁷ In interpreting *PJB Communications*, the Commission determined that Commission staff does not use a strict gross revenues standard but reviews all responses to NALs that claim inability to pay a forfeiture on

¹¹ *KSCT-TV, Inc.*, 699 F.2d 1185, 1191 – 1192 (D.C. Cir. 1983).

¹² *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997) (“*Forfeiture Policy Statement*”).

¹³ 47 C.F.R. § 1.80(b)(4).

¹⁴ See *Radio One Licenses, Inc.*, 18 FCC Rcd 15964, 15965 (2003), *recon. denied*, 18 FCC Rcd 25481 (2003).

¹⁵ 7 FCC 2088 (1992) (“*PJB Communications*”).

¹⁶ *PJB Communications*, 7 FCC Rcd at 2089.

¹⁷ *PJB Communications*, 7 FCC Rcd at 2089.

a case-by-case basis in accordance with Section 503(b)(2)(D) of the Act.¹⁸

8. In One Mart's initial response to the *NAL*, One Mart claimed an inability to pay the forfeiture but provided no data to support its claim. It later provided the tax forms for the three most recent years (2003, 2004 and 2005) prior to the issuance of the *NAL*. The information on those tax forms show that One Mart operated at a loss for only one of those three years, in 2005, and its gross revenues during that year were approximately four times the amount of the loss it reported. During all three years, and on average, the forfeiture amount proposed was less than one percent of One Mart's gross revenues. Consequently, we find no error in the Region's assessment of One Mart's inability to pay. One Mart also argues that the Region failed to take into account its 2006 tax return, which was filed with the Region on August 16, 2007, more than eight months after the *NAL* was issued. We find no error in the Region's actions, given One Mart's late-filing of the documents, and the fact that it previously filed the available tax forms from the most recent three years with the Region. In any event, even taking into account the information in One Mart's 2006 tax return, we find that it does not support an inability to pay claim because even though the tax form reports a loss, the gross revenues total more than five times the reported loss, and the proposed forfeiture amount is less than one percent of the reported gross revenues. As with the losses reported by One Mart in 2005, we find that in 2006, its gross revenues were sufficiently great, that the fact that it was operating at a loss did not mean that it could not afford to pay a \$6,400 forfeiture, particularly given that it sold KEVT(AM) in 2007 for over \$1,000,000.¹⁹ We therefore find that use of One Mart's gross revenues as reported on its tax returns to determine its inability to pay was appropriate in this case, and affirm the Region's analysis of One Mart's inability to pay claim.

9. One Mart also asserts that its forfeiture amount should be reduced significantly, consistent with the large reductions given in other cases reviewed by the Region.²⁰ We note that in each of the cases cited by One Mart, the subject's forfeiture amount was reduced to approximately two percent of the subjects' gross revenues, averaged over the three most recent years, according to tax returns and other accounting data submitted by the subjects.²¹

10. One Mart also asserts that the Region failed to take into account other matters as justice may require,²² including the local nature of the broadcast service it provided, along with the value of the

¹⁸ *Forfeiture Policy Statement*, 12 FCC Rcd at 17106 – 17107.

¹⁹ *See supra*. n.3. *See also* File No. BAL-20061010ACT, Asset Purchase Agreement.

²⁰ *See Jose A. Mollinedo*, 22 FCC Rcd 3903 (EB 2007) (forfeiture reduced to \$500 based on reported gross revenues); *Albino Ortega and Maria Juarez*, 22 FCC Rcd 8515 (EB 2007) (forfeiture reduced to \$500 based on reported gross revenues); *Gla-Mar Broadcasting, LLC.*, 22 FCC Rcd 9232 (EB 2007) (forfeiture reduced to \$250 based on reported gross revenues); *K.M. Television of Flagstaff*, 22 FCC Rcd 5027 (EB 2007) (forfeiture cancelled based on reported gross revenues).

²¹ One Mart also argues that the Region's decision fails to "consider that basing forfeitures on gross revenues has a disparate impact on minority broadcasters such as . . . the sole shareholder of One Mart Corporation." One Mart asserts that such broadcasters frequently operate without reserves or access to adequate credit resources. One Mart, however, makes no specific assertions regarding One Mart's lack of access to credit or capital. We again note that One Mart's public filings with the Commission indicate that One Mart does not have issues regarding lack of access to capital or credit, given that One Mart sold KEVT(AM) to Sloan Broadcasting, LLC, for over \$1,000,000, on January 5, 2007, and purchased KQTL(AM) from Multicultural Radio Broadcasting Licensee, LLC, for a similar amount, later that year. *See supra*. n.3. *See also* File No. BAL-20061010ACT, Asset Purchase Agreement, and File No. BAL-20070129ALJ, Asset Purchase Agreement.

²² One Mart requests that we reduce the forfeiture based its owner's personal circumstances prior to the violation. Considering the totality of the circumstance in this case, we find that such a reduction is not justified. *See Jerry Russell d/b/a The Russell Company*, 22 FCC Rcd 9065 (EB 2007); *Claro Communications, LTD.*, 23 FCC Rcd 359 (EB 2008).

service it provided to the Hispanic community of Cortaro, Arizona. One Mart's efforts and service do not support a reduction in the forfeiture amount. The Commission has consistently held that "licensees are expected to comply with the Commission's Rules as well as to make continued efforts to serve the community to which they are licensed and will not be relieved of liability for violations of the Rules by the fact they have fulfilled their responsibility to serve their communities."²³ Additionally, "a licensee is not relieved of responsibility for complying with applicable statutes and rules by the fact that it has performed an outstanding public service to the community."²⁴

11. We have considered the arguments raised by the One Mart in its *Petition* and find they are unpersuasive. Therefore, we deny the One Mart's *Petition*, and affirm the Region's *Forfeiture Order* finding One Mart liable for a forfeiture in the amount of \$6,400.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended,²⁵ and Section 1.106 of the Commission's Rules,²⁶ One Mart Corporation's *Petition for Reconsideration*, filed October 9, 2007, **IS DENIED**, and the Region's *Forfeiture Order* **IS AFFIRMED**.

13. Payment of the forfeitures ordered by the Region and affirmed by this *Memorandum Opinion and Order* shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁷ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

²³ *Radio Beaumont, Inc.*, 50 FCC 2d 904 (1975). See also *Garvin County Broadcasting, Inc.*, 46 FCC 2d 954 (1974).

²⁴ *Esther Blodgett*, 18 FCC 2d 6 (1969). See also *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968).

²⁵ 47 U.S.C. § 405.

²⁶ 47 C.F.R. § 1.106.

²⁷ 47 U.S.C. § 504(a).

14. **IT IS FURTHER ORDERED** that this Order shall be sent by regular mail and by certified mail, return receipt requested, to One Mart Corporation, at its address of record, and Ernest T. Sanchez, its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Associate Chief, Enforcement Bureau